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15 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

16 WILDEARTH GUARDIANS and) Case No. CV 09-1166-PHX-FJM
17 WESTERN WATERSHEDS PROJECT,)
18 Plaintiffs,) STIPULATED SETTLEMENT
19 v.)) AGREEMENT AND [PROPOSED]
20 KENNETH SALAZAR, in his official)) ORDER
capacity as Secretary of the United States)
21 Department of the Interior,)
22 Defendant.)

)

1 This Stipulation is entered into by and between Plaintiffs WildEarth Guardians
2 and Western Watersheds Project (collectively, “Plaintiffs”) and Defendant Kenneth
3 Salazar, in his official capacity as Secretary of the United States Department of the
4 Interior.

5 WHEREAS, on October 15, 2008, Plaintiffs submitted to the United States Fish
6 and Wildlife Service (“Service”) a petition to list the Sonoran desert tortoise (*Gopherus*
7 *agassizii*) as a threatened or endangered species pursuant to the Endangered Species Act
8 (“ESA”), 16 U.S.C. § 1531 et seq.;

9 WHEREAS, on June 1, 2009, Plaintiffs filed this action to compel a 90-day
10 finding on the petition;

11 WHEREAS, the parties, through their authorized representatives, and without any
12 admission or final adjudication of the issues of fact or law with respect to Plaintiffs’
13 claims, have reached a settlement that they consider to be a just, fair, adequate, and
14 equitable resolution of the disputes set forth in Plaintiffs’ complaint;

15 WHEREAS, the parties agree that settlement of this action in this manner is in the
16 public interest and is an appropriate way to resolve the dispute between them;

17 NOW, THEREFORE, the parties hereby stipulate and agree as follows:

18 1. On or before August 27, 2009, the Service shall submit to the Federal
19 Register a determination as to whether Plaintiffs’ petition to list the Sonoran desert
20 tortoise presents substantial information indicating that the petitioned action may be
21 warranted pursuant to 16 U.S.C. § 1533(b)(3)(A).

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1 2. Either party may seek to modify the deadline for any of the actions
2 specified in Paragraph 1 for good cause shown, consistent with the Federal Rules of
3 Civil Procedure. In that event, or in the event that either party believes that the other
4 party has failed to comply with any term or condition of this Settlement Agreement
5 ("Agreement"), the parties shall use the dispute resolution procedures specified in
6 Paragraph 3 below.

7 3. The Order entering this Agreement may be modified by the Court upon
8 good cause shown, consistent with the Federal Rules of Civil Procedure, by written
9 stipulation between the parties filed with and approved by the Court, or upon written
10 motion filed by one of the parties and granted by the Court. In the event that either party
11 seeks to modify the terms of this Agreement, including the deadline specified in
12 Paragraph 1, or in the event of a dispute arising out of or relating to this Agreement, or
13 in the event that either party believes that the other party has failed to comply with any
14 term or condition of this Agreement, the party seeking the modification, raising the
15 dispute, or seeking enforcement shall provide the other party with notice of the claim.
16 The parties agree that they will meet and confer (either telephonically or in-person) at
17 the earliest possible time in a good-faith effort to resolve the claim before seeking relief
18 from the Court. If the parties are unable to resolve the claim themselves, either party
19 may seek relief from the Court.

20 4. No party shall use this Agreement or the terms herein as evidence of what
21 does or does not constitute a reasonable time line for issuing a 90-day finding under 16
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1 U.S.C. § 1533 in any other proceeding regarding the Service's implementation of the
2 ESA.

3 5. Defendant agrees that Plaintiffs are the "prevailing party" in this action,
4 and agrees to pay Plaintiffs' reasonable attorneys' fees and costs pursuant to section
5 11(g) of the ESA, 16 U.S.C. § 1540 (g). Defendant therefore agrees to settle all of
6 Plaintiffs' claims for costs and attorneys' fees in this matter for a total of \$2,519. A
7 check will be made payable in that amount to WildEarth Guardians, c/o Lori Colt, 312
8 Montezuma Avenue, Santa Fe, NM 87501. Defendant agrees to submit all necessary
9 paperwork for the processing of the attorneys' fee award to the Department of the
10 Treasury's Judgment Fund Office, pursuant to 16 U.S.C. § 1540(g)(4), within ten (10)
11 business days of receipt of the order approving this Agreement.

12 6. Plaintiffs agree to accept payment of \$2,519 in full satisfaction of any and
13 all claims for attorneys' fees and costs of litigation to which Plaintiffs are entitled in this
14 matter through and including the date of this Agreement.

15 7. Plaintiffs agree that receipt of this payment from Defendant shall operate
16 as a release of Plaintiffs' claims for attorneys' fees and costs in this matter, through and
17 including the date of this Agreement.

18 8. The parties agree that Plaintiffs reserve the right to seek additional fees and
19 costs incurred subsequent to this Agreement arising from a need to enforce or defend
20 against efforts to modify the underlying schedule outlined in Paragraph 1 or for any
21 other continuation of this action. By this Agreement, Defendant does not waive any
22 right to contest fees claimed by Plaintiffs or Plaintiffs' counsel, including the hourly rate,

1 in any future litigation or continuation of the present action. Further, this Agreement as
2 to attorneys' fees and costs has no precedential value and shall not be used as evidence
3 in any other attorneys' fees litigation.

4 9. Subject to the qualifications in Paragraph 10, no provision of this
5 Agreement shall be interpreted as, or constitute, a commitment or requirement that
6 Defendant take action in contravention of the ESA, the Administrative Procedure Act
7 ("APA"), or any other law or regulation, either substantive or procedural. Nothing in
8 this Agreement shall be construed to limit or modify the discretion accorded to the
9 Service by the ESA, the APA, or general principles of administrative law with respect to
10 the procedures to be followed in making any determination required herein, or as to the
11 substance of any final determination.

12 10. Nothing in this Agreement shall be interpreted as, or shall constitute, a
13 requirement that Defendant is obligated to pay any funds exceeding those available, or
14 take any action in contravention of the Anti-Deficiency Act, 31 USC 1341, or any other
15 applicable appropriations law.

16 11. The parties agree that this Agreement was negotiated in good faith and that
17 this Agreement constitutes a settlement of claims that were denied and disputed by the
18 parties. By entering into this Agreement, the parties do not waive any claim or defense.

19 12. The undersigned representatives of each party certify that they are fully
20 authorized by the party or parties they represent to agree to the Court's entry of the terms
21 and conditions of this Agreement and do hereby agree to the terms herein.

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1 13. The terms of this Agreement shall become effective upon entry of an order
2 by the Court ratifying the Agreement.

3 14. Upon approval of this Agreement by the Court, all counts of Plaintiffs'
4 complaint shall be dismissed with prejudice. Notwithstanding the dismissal of this
5 action, however, the parties hereby stipulate and respectfully request that the Court
6 retain jurisdiction to oversee compliance with the terms of this Agreement and to resolve
7 any motions to modify such terms. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
8 U.S. 375 (1994).

9 | Dated: August 19 2009

Respectfully submitted,

/s/ Samantha Ruscavage-Barz
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JEAN E. WILLIAMS
Section Chief
LISA L. RUSSELL
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/s/ H. Hubert Yang
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Attorneys for Defendant

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 19, 2009, I electronically filed the foregoing
3 Stipulated Settlement Agreement and [Proposed] Order with the Clerk of the Court using
4 the CM/ECF system, which will send notification of this filing to the attorneys of record.

5 */s/ H. Hubert Yang*
6 H. HUBERT YANG
7 Trial Attorney
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10 Wildlife & Marine Resources Section
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